January 27, 2004

D.T.E. 03-04-24

Complaint filed by Hwei-Ling Greeney, pursuant to G. L. c. 93, § 108 et seq., with the Department of Telecommunications and Energy claiming that her long-distance and local toll exchange services were switched to Sprint Communications Company, L.P., without authorization.

APPEARANCES: Hwei-Ling Greeney
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PRO SE
Complainant

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For: SPRINT COMMUNICATIONS COMPANY, L.P.
Respondent

I. INTRODUCTION

On October 9, 2003, Hwei-Ling Greeney ("Complainant"), pursuant to G.L. c. 93, § 108 et seq., filed a complaint with the Department of Telecommunications and Energy ("Department") alleging that Sprint Communications Company, L.P., ("Sprint" or "Company") switched her long-distance service without authorization.[1] The Complainant receives local telephone service from Verizon Massachusetts ("Verizon") at her home in Amherst, Massachusetts. On December 18, 2003, pursuant to notice duly issued, the Department conducted an evidentiary hearing.[2] The Complainant testified on her own behalf and offered the testimony of her son, Anda Greeney. The Company offered the testimony of Robert J. Saak, a program manager with Sprint's long-distance action center. The record consists of three exhibits from the Complainant, four from the Company, and twelve from the Department. The Department also issued and received responses to five record requests from the Company.

II. POSITIONS OF THE PARTIES

A. Complainant

The Complainant submitted her invoices from Verizon for service from August 8, 2003, through September 8, 2003 (Exh. DTE-9). The Complainant testified that she had Qwest Communications ("Qwest") as her long-distance provider prior to the alleged slam (Tr.

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[1] Pursuant to 220 C.M.R. § 13.02, any unauthorized change to a customer's primary interexchange carrier or local exchange carrier is known as "slamming."

[2] This hearing was originally scheduled for December 4, 2003, but pursuant to a joint motion by the parties was continued until December 18, 2003 (Exh. DTE-1).

at 27). The Complainant stated that when she received her Verizon bill for the bill period ending September 8, 2003, she discovered that Sprint had billed her as her long-distance provider (Exh. DTE-9; Tr. at 27). The Complainant testified that she had never received a notice soliciting a change in her service provider, nor did she initiate any such change (Exh. DTE-9). Instead, according to the Complainant, after research she determined that the switch was initiated after her then 18 year-old son attempted to exchange his cellular phone (id.; Tr. at 17).

The Complainant's son stated that he entered the Sprint PCS store on 42nd Street in New York City, in July of 2003, to exchange his cellular phone (Tr. at 17-18). The Complainant's son further testified that a sales representative gave him several forms to fill out in order to receive his new phone (id. at 18). According to the Complainant's son, the representative gave him three documents and told him to sign his name to the forms at those places indicated by the representative, which the Complainant's son stated he did (id.). He further testified that after he gave the representative the forms, the Sprint representative asked for his permanent telephone number, so he gave the representative his parents' phone number (id.).

According to the Complainant's son, he never wrote his parents' home phone number down on any of the documents, though he stated that he did write his cellular phone number along with other information, including his New York City address (Exh. Sprint-1; Tr. at 19). The Complainant's son testified that the representative filled out the other information that he supplied to the representative, but that he was unaware that it was being transcribed onto a

letter of agency ("LOA")[3] (Exh. Sprint-1; Tr. at 31). Furthermore, the Complainant's son noted that he left unchecked the box regarding whether he wanted Sprint as his long distance carrier because he only wanted to replace his cellular phone, not switch his long-distance service (id. at 19).

The Complainant stated that she never authorized the switch in service (id. at 17). In fact, Complainant argued that even if her son had attempted to switch the family's long-distance telephone service to Sprint, he would have had no authority to do so because he is not the customer of record, nor is he responsible for paying the bill (id. at 13). She also stated that her son, at the time of the switch, was not residing at her home in Amherst, but was instead residing at a New York City address noted in the LOA. Therefore, she argued that Sprint should have known that the Complainant's son did not have authority to authorize a switch because his name and address did not match the name that the local service provider gave to the Company when the Company endeavored to switch her service (id.). Upon learning of the switch to Sprint, the Complainant returned her long-distance telephone service to Qwest, her original provider (id. at 29).

B. Sprint

Sprint provided the Department a LOA signed by the Complainant's son and dated July 22, 2003 (Exh. Sprint-1). Sprint contends that the LOA is in compliance with both federal and state regulations (Tr. at 38). Sprint argues that the Complainant's son is a resident of the

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[3] A LOA is a document signed by a customer to indicate that the customer has authorized a change in his or her interexchange or local exchange carrier.

service address and is above the age of 18 (id. at 24). Therefore, in compliance with both state and federal regulations, he could make long-distance service decisions for the family (id.). The Company further testified that it added the Complainant's name to the list of authorized customers living at the family's address (id. at 100).

III. STANDARD OF REVIEW

Pursuant to G.L. c. 93, § 109(a), a change in a customer's primary interexchange carrier ("IXC") shall be considered to have been authorized only if the IXC or local exchange carrier ("LEC") that initiated that change provides confirmation that the customer did authorize such change either through a signed LOA or oral confirmation of authorization through a valid third party verification ("TPV") obtained by a company registered with the Department to provide TPV services in the Commonwealth.

Moreover, the Department has determined that G. L. c. 93, § 109(a), is to be liberally construed. A consumer protection statute must be construed in favor of the customer in order to effect legislative intent. Ronald Karas v. ACN Communications Services, Inc., D.T.E. 03-04-9, at 4 (2003). Reading intent to violate (rather than the mere fact of violation) into § 109(a) would tend to defeat the legislative purpose to offer simple and clear remedies to the consumer. Such a reading would also encumber the consumer with proving the carrier's intent. Id. citing, Baldassari v.Public Finance Trust Company, 269 Mass. 33, 40-41 (1975); Slaney v. Westwood Auto Company, 366 Mass. 688, 699-700, 703 (1975). Such a proof is, practically speaking, beyond an ordinary customer's ability and is not necessary to effecting the statute's protective purpose. Indeed, it would defeat that purpose.

Pursuant to G.L. c. 93, § 110(i) and upon receipt of a slamming complainant, the Department shall hold a hearing to determine, based on our review of the LOA or TPV and any other information relevant to the change in telephone service, whether the customer did or did not authorize the carrier change.

In addition to the Massachusetts slamming law set forth above, the Federal Communications Commission ("FCC") implemented slamming liability rules in May 2000. Corrected Version First Order on Reconsideration, CC Docket No. 94-129 (May 3, 2000) ("Corrected Order"). In accordance with those rules, the company that switches a customer's telephone service without authorization must pay the customer's authorized company a penalty equal to 150 percent of the charges received from the customer. The authorized company is then required to return a certain amount to the customer as specified in 47 C.F.R. § 64.1140. In the Corrected Order, the FCC concluded that states should have primary responsibility for administering their slamming liability rules (See ¶¶ 22-28, 33-37, 52, 84). On November 3, 2000, pursuant to 47 C.F.R. § 64.1110, the Department provided to the FCC its State Notification of Election to Administer FCC Rules (See Letter to Magalie Roman Salas, Secretary, Federal Communications Commission, November 3, 2000).

IV. ANALYSIS AND FINDINGS

In accordance with G.L. c. 93, § 110(i), the Department conducted a hearing to determine whether the change in the Complainant's long-distance carrier was authorized. Sprint presented a LOA to support its position that the Complainant's son authorized the switch.

The Department must determine whether the LOA that the Company issued to the Complainant's son complied with the Department's standard. G. L. c. 93, § 109(b)(3) states, among other things, that a LOA must, at a minimum, be printed in 12 point type. By specifying the exact type set, the Legislature ensured that regardless of font, a LOA will be in a certain size print. The Department issued a record request to confirm whether the LOA was in compliance; the Company responded that the LOA was in 10 point type (RR-DTE-4; Tr. at 85).

The Company argues that the type is legible, regardless of the type size (RR-DTE-5). The statute, however, creates a bright line obligation on the Company, not a guideline for its discretion. Because the type is not 12 point type, the LOA is clearly not in compliance with G.L. c. 93, § 109(b)(3). By specifying "a minimum" of type size, the Legislature was not merely setting out a technical detail subject to administrative waiver. In any event, the Department has not waived this requirement. See G.L. c. 93, § 109(5) (waiver of the TPV recording requirement). The Legislature sought rather to ensure legibility of the "clear and unambiguous language" that the LOA must contain. See G.L. c. 93, § 109(b)(3). Sprint's attempt to minimize the emphatic statutory command does not avail. Therefore, the Department finds the LOA does not comply with the statute, and the Company did not receive valid authorization to switch the Complainant's long-distance telephone service.

Inspecting the LOA further, the Department notes several inconsistencies or missing information. The LOA appears to be deficient on its face, in that certain key information or responses are left blank. The LOA indicates that a date of birth is a required item; however, it

was not filled out in this case. In addition, the LOA contains a check-off section for "yes" or "no" as to whether the customer wants Sprint to be the residential long-distance carrier. In this case, neither box was checked. In the future, if an item is listed as required, the Company should obtain, at the very least, all the information indicated as "required" on the form or not process the LOA.

We could base our decision on the failure of Sprint to meet the type size requirement of G.L. c. 93, § 109(b)(3), but that seems rather narrow and technical, even though the statute is both clear and mandatory. Sprint's claim (i.e., that any household member may, conformably to statute, authorize a switch of long-distance carrier), however, permits basing our decision on a broader and sounder basis. Sections 108-110 require that the "customer" as defined in § 108 authorize the switch of service. A "customer" is someone who resides in Massachusetts and "subscribes to local and long-distance telecommunication service." G.L. c. 93, § 108. By common acceptation and as customarily understood in Department practice, a "customer" is the person who requests utility service, whose name appears on the bill as the "customer of record", and who is responsible to pay for service rendered. While the customer, so understood, may authorize an agent to act for him in utility matters, until that agency relationship is clearly established with respect to a LOA, the IXC or LEC has no basis for switching a customer's service on the say-so of a purported agent (household member or not). There is no implied authority or apparent authority arising from household membership, for purposes of a LOA, that warrants the IXC's or LEC's reliance on the status of household membership as establishing agency. It is black-letter law that a third-party deals with an agent

and even more so with a purported or a supposed agent "at his own peril." Mussey v. Beecher, 3 Cush. (57 Mass.) 511, 517 (1849). For purposes of a LOA, actual authority to act for the customer of record/principal comes from the consent of the principal, not from the uncorroborated representation by the purported agent and certainly not from the self-interested supposition of an IXC seeking new long-distance customers.[4]

As to Sprint's claim of reliance on Anda Greeney's membership in the Complainant's household as somehow authorizing him to switch long distance service, no authority, whether from statute or from common law agency, can be said to arise from this relationship. We have already considered the statutory definition of "customer" in § 108 in light of both common understanding and Department practice. A review of the record discloses no tenable claim of actual agency, whether express or implied, flowing from the Complainant to her son to act on her behalf under the statute. First, there is the Complainant's uncontradicted denial that she granted express authority to her son to act for her for purposes relevant to §§ 109-110 (Tr. at 17). Second, there is a complete lack of evidence of implied authority so to act arising from the Complainant's conduct, and certainly none can be inferred from her consenting to her son's remaining a household member. Nor is there any basis for a claim of apparent authority created as to Sprint "by written or spoken words or any other conduct of the [Complainant] which, reasonably interpreted," might cause Sprint to believe that the Complainant consented

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[4] We note that third party verification under 220 C.M.R. 13.03(2) follows a different rule from that established here for LOA authorization.

to have her service switched by her son. See Theos & Sons, Inc. v. Mack Trucks, Inc., 431 Mass. 736, 744 (2000), quoting Restatement (Second) of Agency, at § 27 (1958).

We find that Sprint initiated this unauthorized switch in the Complainant's local and long-distance services; and, in accordance with the FCC's Corrected Order, the we direct Sprint to refund the Complainant any fees paid by her in making the switch and to credit her account for any other charges incurred while using Sprint's service.[5] Sprint is also directed to pay Qwest, the Complainant's authorized long-distance provider, 150 percent of the charges it received from the Complainant within 10 days of this Order. Qwest shall also remit the amount specified in 47 C.F.R. §64.1140 to the Complainant.

We note that the Department regulations specifically provided that someone other than the customer of record may, under specific circumstances, verbally authorize a change in the primary IXC or LEC during a third-party verification call. See 220 C.M.R. §13.03(2).

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[5] Because the Company credited the account, there is no amount to remit (Tr. at 42).

V. ORDER

Accordingly, after notice, hearing, consideration, and determination, the Department finds that Sprint violated the provisions of Massachusetts G.L. c. 93, § 109(b)(3) by providing long-distance telephone service to Ms. Hwei-Ling Greeney without authorization.

By Order of the Department,

_____/s/_____
Paul G. Afonso, Chairman

_____/s/_____
James Connelly, Commissioner

_____/s/_____
W. Robert Keating, Commissioner

_____/s/_____
Eugene J. Sullivan, Jr., Commissioner

_____/s/_____
Deirdre K. Manning, Commissioner

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).